BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

WALT COX, Appellant, v. OLYMPIC AIR POLLUTION CONTROL AUTHORITY, Respondent.	PCHB No. 89-57 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (Revised)

Walt Cox appealed the Olympic Air Pollution Control Authority's ("OAPCA") issuance of a Notice of Civil Penalty Assessment ($100) for alleged violation on June 16, 1988 of OAPCA Regulation I, Section 9.01 for burning prohibited material. The Pollution Control Hearings Board ("Board") held a hearing on November 1, 1989. Present for the Board were Members Judith A. Bendor, Presiding, and Harold S. Zimmerman. Attorney G. Saxon Rodgers of Ditlevson, Rodgers & Hanbey, P.S., (Olympia) represented appellant Cox. Attorney Fred Gentry of Bean, Gentry and Rathbone (Olympia) represented respondent OAPCA. Court reporter Bibi Carter with Gene Barker and Associates recorded the

proceedings. Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was made. From the foregoing, the Board issued Final Findings of Fact, Conclusions of Law and Order issued on December 5, 1989, affirming the penalty.

On December 12, 1989 appellant Cox filed a Petition for Reconsideration. On December 19, 1989 appellant filed a transcript excerpt of the testimony of witness Shawn Redmond. On December 20, 1989 OAPCA filed a Response. Having reviewed the record and the filings on Reconsideration, the Board issues these revised:

FINDINGS OF FACT

I

Walt Cox owns Walt Cox Construction Company ("Cox") and was and is the developer of Emerald Hills, a residential development in Lacey, Washington.

The Olympic Air Pollution Control Authority ("OAPCA") has authority to conduct an air pollution prevention and control program in an area which includes the City of Lacey. The Pollution Control Hearings Board ("PCHB") recognizes OAPCA's Regulation I, Section 9.01 which deals with open fires.

II

On June 16, 1988, Lacey Fire District No. 3 responded to a fire at Emerald Hills, in an area known as "former lot 29." There was a 15 foot by 15 foot hot fire in a pit. Around the fire, scorched and

burned were carpet material, plastics, and asphalt shingle scraps. We find that the carpet material, plastics and asphalt had been burned. Several individuals were nearby in a pickup truck. Former lot 29 was vacant, and had been cleared of any vegetation and brush.

III

Cox had received plat approval for Emerald Hills in December 1987. At the time of the fire the company had built 20 homes at Emerald Hills, of the total 82 it was to eventually build there. Only 3 homes were to be built by others out of the 85 total homes. On June 16, 1988, the Company was building within 500 feet of the fire. On one lot adjacent to the fire someone else was building a house. In June 1988, Cox employees or subcontractors came and went on former lot 29. From his perspective, Cox considered Emerald Hills to be one piece of property. Cox did not stop anyone from going on any lot within Emerald Hills.

During the hearing the parties stipulated that the City of Lacey legally owned former lot 29 on June 16, 1988. The legal ownership is still being contested in court. However, in September 1988 after the incident, Cox applied for a fire permit to burn on former lot 29. In October 1988, Cox again applied for a fire permit to burn on that lot. In both instances the fire department went out and inspected the site with Mr. Cox. The October inspection revealed that there was plastic in the pile that was to be burned, and the fire inspector requested that it be removed prior to burning.

Cox conceded that he would not have been "comfortable" applying for a fire permit for someone else's property or walking on such site with the fire department. The fire department witness stated that during the fire permit application process Cox said he owned the lot. Mr. Cox testified that he did not say specifically that he was the owner.

We find, after observing the witnessês demeanor, hearing all the testimony, and examing the exhibits, that Cox conducted his affairs on June 16, 1988 as if he owned the property, exercising control over it. We further find, using reasonable inferences, that it is more probable than not that Cox allowed the burning of prohibited material to occur on June 16, 1988 on former lot 29.

IV

On March 30, 1989, OAPCA issued Notice of Civil Penalty Assessment ($100) to Walt Cox for alleged violation of Regulation I, Section 9.01 for burning unlawful material. This Notice was served on Walt Cox on April 25, 1989. The appeal was filed on May 2, 1989, which became our PCHB No. 89-57.

V

On September 5, 1989, OAPCA filed a Motion to Dismiss contending the appeal did not conform with Chapt. 371-08 WAC. In response appellant filed an Amended Notice of Appeal (September 15, 1989).

VI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes the following revised:

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the parties and the subject of this appeal. Chapts. 43.21B and 70.94 RCW.

II

We conclude that Motion to Dismiss should be denied. The Amended Notice of Appeal, filed six weeks before the hearing, satisfied Chapt. 371-08 WAC. The primary function of pleadings in administrative appeals is to serve the function of notice. See, Marysville v. Puget Sound Air Pollution Control Agency, 104 Wn.2d 115, 702 P.2d (1985); Council for Land Care and Planning, et al. v. Spokane County Air Pollution Control Authority, et al., PCHB No. 88-23 (Order Denying Summary Judgment, January 12, 1989). The notice function was served and no prejudice has been claimed.

III

OAPCA Regulation I at Section 9.01 states in pertinent part:

> (a) No person shall cause or allow any open fire within the jurisdiction of the Authority except as follows:
> [. . .]

> (4) Any fire allowed under this section is subject to the following:
> [. . .]
> (iv) No material containing asphalt, petroleum products, paints, rubber products, plastic or any substance which normally emits dense smoke or obnoxious odors will be burned.

We conclude that prohibited materials had been burned in this open fire in violation of Section 9.01, Regulation I.

IV

In this penalty action, the air pollution authority has to demonstrate that the Cox Company was liable, that as a matter of law the company "caused or allowed" the prohibited materials to be burned. Section 9.01(a).

A contractor is responsible for the acts of its employees and subcontractors. Ken Pearson Construction, Inc. v. PSAPCA, PCHB No. 88-186. We conclude as a matter of law, given all the facts,that it is more probable than not that appellant Cox did allow the burning of prohibited material to occur, violating Section 9.01(a). See, Cummings v. DOE, PCHB No. 85-89. Cox's construction activities in Emerald Hills far exceeded the few houses built by others. His employees or subcontractors were working in the vicinity of the fire on the day in question. His conduct, despite the technical status of Lacey's legal ownership, was that of someone who controlled the

property. After the incident, as late as October 1989, he sought to burn on that same former lot 29.

VI

One of the principal aims of a civil penalty is to secure future compliance. The maximum statutory penalty is $1,000. Only $100 was assessed. We conclude that the penalty was appropriate.

VI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such. From Conclusions of Law, the Board enters this:

ORDER

The Petition for Reconsideration is Granted in so far as the Findings and Conclusions are Revised.

The Petition is Denied in so far as Reversal is requested.

OAPCA's Notice of Civil Penalty Assessment ($100) issued to Walt Cox is RE-AFFIRMED.

DONE this 20th day of December, 1989.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

HAROLD S. ZIMMERMAN, Member

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Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was made. From the foregoing, the Board makes the following:

FINDINGS OF FACT

I

Walt Cox owns Walt Cox Construction Company ("Cox") and developed Emerald Hills, a residential development in Lacey, Washington.

Olympic Air Pollution Control Authority ("OAPCA") has authority to conduct an air pollution prevention and control program in an area which includes the City of Lacey. The Pollution Control Hearings Board ("PCHB") recognizes OAPCA's Regulation I, Article 9.

II

On June 16, 1989, Lacey Fire District No. 3 responded to a fire at Emerald Hills, in an area known as "former lot 29." There was a 15 foot by 15 foot hot fire in a pit. In the fire or smoking as the result of the fire were carpet material, plastics, and asphalt shingle scraps. Several individuals were nearby in a pickup truck.

Former lot 29 was vacant, and had been cleared of any vegetation and brush.

III

Cox had received plat approval for Emerald Hills in December 1988. At the time of the fire the company had built 20 homes at Emerald Hills, of the total 82 it was to build there. Another 3 homes

were to be built by others, for a total of 85 homes. On June 16, 1989, the Company was building within 500 feet of the fire. On one lot adjacent to the fire someone else was building a house. In June 1988, Cox employees or subcontractors came and went on former lot 29. From his perspective, Cox considered Emerald Hills to be one piece of property. Cox did not stop anyone from going on any lot within Emerald Hills.

During the hearing the parties stipulated that the City of Lacey legally owned former lot 29 on June 16, 1989. The legal ownership is still being contested in court. However, in September 1989 after the incident, Cox applied for a fire permit to burn on former lot 29. In October 1989, Cox again applied for a fire permit. In both instances the fire department went out and inspected the site with Mr. Cox. Cox conceded that he would not have been "comfortable" applying for a fire permit for someone else's property and walking on that site with the fire department. The fire department witness stated that during the application process Cox said he owned the lot. Mr. Cox testified that he did not say specifically that he was the owner.

IV

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V

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VI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes the following:

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IV

Appellant does not contest that prohibited materials were burned. Appellant does dispute any legal liability for the fire.

V

In this penalty action, the air pollution authority has the burden to prove that the Cox Company "caused or allowed" the prohibited materials to be burned. Section 9.01(a)(4)(iv). The standard of proof is "more probable than not." A contractor is responsible for the acts of its subcontractors. Ken Pearson Construction, Inc. v. PSAPCA, PCHB No. 88-186. The Authority need not prove which of these two entities actually set the fire in order for it to have sustained its burden of proof.

We conclude under all the facts that it is more probable than not that appellant Cox did cause or allow the burning to occur. Cox

conducted his affairs, even after June 16, 1989, as if he had control over former lot 29. The technical status of Lacey's legal ownership did not prevent him as late as October 1989 from seeking to burn on that property. Moreover, Cox's construction activities in Emerald Hills far exceeded the few houses built by others, and his employees or subcontractors were working in that general area on the day in question.

VI

One of the principal aims of a civil penalty is to secure future compliance. The maximum statutory penalty is $1,000. Only $100 was assessed. We conclude that the penalty was appropriate.

VI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such. From Conclusions of Law, the Board enters this

ORDER

OAPCA's Notice of Civil Penalty Assessment ($100) issued to Walt Cox is AFFIRMED.

DONE this 5th day of December, 1989.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

HAROLD S. ZIMMERMAN, Member